Supreme Court, U.S.
FILED
FEB 5 1993
OFFICE OF THE CLERK

No. 92-964

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT F. COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
NINA GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the government deprived petitioner of due process when it conducted a pretrial survey concerning the criminal justice system and petitioner's upcoming trial, and did not disclose the results of the study to petitioner until after his trial.

2. Whether the district court erred in finding that the government did not discriminate on the basis of race in exercising its peremptory challenges.

3. Whether the prosecutor commented during closing argument on petitioner's failure to testify or his prearrest silence.

4. Whether the district court deprived petitioner of due process by applying provisions of the Sentencing Guidelines that make the sentence for petitioner's bribery offense depend on the seriousness of the underlying offense with respect to which he accepted a bribe.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	17
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Batson v. *Kentucky*, 476 U.S. 79 (1986)	9, 20, 21
Brady v. *Maryland*, 373 U.S. 83 (1963)	12, 14, 17, 18
Darden v. *Wainwright*, 477 U.S. 168 (1986)	24
Griffin v. *California*, 380 U.S. 609 (1965)	22
Hernandez v. *New York*, 111 S. Ct. 1859 (1991)	21
Richardson v. *Marsh*, 481 U.S. 200 (1987)	19
Smith v. *Phillips*, 455 U.S. 209 (1982)	17
United States v. *Agurs*, 427 U.S. 97 (1976)	18, 19
United States v. *Bagley*, 473 U.S. 667 (1985)	19
United States v. *Briscoe*, 896 F.2d 1476 (7th Cir. 1990)	22
United States v. *Chalan*, 812 F.2d 1302 (10th Cir. 1987), cert. denied, 488 U.S. 983 (1988)	20
United States v. *David*, 803 F.2d 1567 (11th Cir. 1986)	20-21
United States v. *Robinson*, 485 U.S. 25 (1988)	23
United States v. *Romero-Reyna*, 889 F.2d 559 (5th Cir. 1989), cert. denied, 494 U.S. 1084 (1990)	20
United States v. *Smith*, 910 F.2d 326 (6th Cir. 1990)	25
United States v. *Willis*, 925 F.2d 359 (10th Cir. 1991)	24
United States v. *Wilson*, 867 F.2d 486 (8th Cir.), cert. denied, 493 U.S. 827 (1989)	22

Constitution, statutes and rule: Page

U.S. Const. Amend. V 22-23
18 U.S.C. 201(b)(2) 2
18 U.S.C. 371 2
18 U.S.C. 1503 2
Sentencing Guidelines:
§ 2C1.1(a) 11
§ 2C1.1(b) 11
§ 2C1.1(b)(2)(B) 11
§ 2C1.1(c)(1) 16
§ 2C1.1(c)(2) 11, 24
§ 2X3.1 ..... 11, 24
§ 3B1.3 11
Fed. R. Crim. P. 35 7

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-964

ROBERT F. COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-70) is reported at 972 F.2d 1385. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 82-103) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1992. The petition for a writ of certiorari was filed on December 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of bribery, in violation of 18 U.S.C. 201(b)(2); obstruction of justice, in violation of 18 U.S.C. 1503; and conspiracy to commit those offenses and to defraud the United States, in violation of 18 U.S.C. 371. He was sentenced to 82 months' imprisonment. The court of appeals affirmed. Pet. App. 1-70.

1. In the summer of 1989, Gary Young became concerned that he would be indicted on charges arising out of his involvement in a 1985 marijuana importation operation. Young's attorney advised Young that if he was indicted the case probably would be assigned to petitioner, the federal district judge who had handled the charges against Young's co-conspirators. A business associate of Young's, John Yemelos, suggested to Young that petitioner's longtime friend John Ross might be able to help Young bribe petitioner. When Young met with Ross on September 14, 1989, Ross assured Young that he could help him. Young subsequently entered into a plea agreement under which he agreed to plead guilty to certain drug-related offenses. The next day, Yemelos called Young to arrange a meeting with Ross. Young told his attorney about the call from Yemelos; Young's attorney in turn contacted federal authorities. Pet. App. 2-3.

Young, Ross, and Yemelos met on September 29.[1] Young and Ross agreed that Young would pay Ross $100,000 to bribe petitioner to sentence Young leniently. Ross confirmed that he could help Young if his case was assigned to petitioner, and he promised Young that he would "try not to get you any jail time." In a phone call on February 1, 1990, Ross told Young that he had met

[1] Before the meeting, FBI agents fitted Young with a hidden recording device. Pet. App. 3.

with petitioner on January 29, 1990, and that "I didn't, didn't discuss anything by name or anything like that, I just told him that, ah . . . you know, there's a situation. And before it comes up we'll have lunch and all that business." Pet. App. 3-5.[2]

On April 5, 1990, a federal grand jury in the Eastern District of Louisiana returned an indictment charging Young with certain drug-related offenses. After the case was assigned to a judge other than petitioner, Young informed Ross that his attorney intended to file a motion to transfer the case to petitioner. Ross confirmed that he had mentioned the "situation" to petitioner, who had told Ross to let him know when the matter would come up. Ross stated that once the transfer motion was filed, "I'm going to see [petitioner] and tell him . . . to ask for the case . . . well what I mean by ask was, not to refuse to accept the case." Ross went on to tell Young that "as soon as you hear that [petitioner] got the case you get on your knees and thank God." Pet. App. 5.

On May 16, Young told Ross that Young's attorney and the prosecutor handling his case had scheduled a telephone conference call with petitioner for the following day, to discuss whether petitioner would accept Young's case. Ross then placed a call to petitioner's chambers and asked petitioner's secretary to let petitioner know that Ross needed to see him. Later that day, Ross told Young that he was "gonna take him to lunch, and . . . work out some arrangements." The next day, Ross had lunch with petitioner in a restaurant at a New Orleans

---

[2] On November 30, 1989, the Public Integrity Section of the Justice Department notified Chief Judge Charles Clark of the Fifth Circuit of the allegations against petitioner. Judge Clark assigned Fifth Circuit Judge John M. Duhe to oversee the investigation. Thereafter, Judge Duhe authorized the installation of pen registers and wiretaps on Ross's office and home telephone lines, and on petitioner's private chambers line. Pet. App. 4-5, 7, 9.

hotel. After lunch, Ross called Young and told him that he had spent a two-hour lunch with their "friend" who "gave me his direct number so [that] I can call him . . . later on this afternoon . . . after he's had a discussion with a few people on the telephone." Later that day, Young's lawyer and the prosecutor made the scheduled conference call to petitioner. During the call, petitioner agreed to take Young's case. Ten minutes later, Ross placed a call to petitioner, using petitioner's private chambers line. Immediately thereafter, Ross called Young to tell him that petitioner had accepted his case. Pet. App. 5-6.

In a meeting with Young the following day, Ross described his agreement with petitioner. Ross told Young that "[h]e wants at least 50 percent before . . . you know, 50 now and 50 after he does what he's going to do." Ross explained that "I'm working on a [illegible], see. So that every time you give me, if you give me this, I'm giving him half." Young told Ross that he could have $20,000 by the next week. Ross replied, "Okay. Cause I'm gonna call him and tell him what he can expect." On May 23, Young met with Ross and gave him $20,000 in prerecorded bills. After Young left his office, Ross called petitioner and told him that he needed to see him to "talk about the property," adding, "I have an estimate for you." In a later telephone call, Ross and petitioner agreed to meet again at the hotel restaurant. Ross asked whether he would be able to "deliver those estimates to you," and petitioner answered, "Yeah . . . Yeah, I'm sure." Ross and petitioner met at the restaurant ten minutes later. Ross was carrying a folder, which he placed between them on the table. Neither man touched the folder while they talked for about half an hour. When they got up to leave, petitioner took the folder with him. Pet. App. 6-7.

At a meeting with Young the next day, Ross described his conversation with petitioner. Ross told Young that petitioner wanted him to get letters from people who knew him and would say favorable things about him, in order to "justif[y] [petitioner's] action" in sentencing Young. According to Ross, petitioner had warned Young to act "scared to death" at his plea hearing and to "keep his mouth closed," because a light sentence might look suspicious. Ross added that petitioner did not want anyone to know that "there was any cash involved." Pet. App. 8.

On May 30, Young gave Ross another $30,000 in prerecorded bills. On the same day, Young appeared in court to enter his guilty plea before petitioner. Petitioner set Young's sentencing for August 8. After the plea hearing, Young told Ross that he had thought he was to be sentenced before petitioner went on vacation in July and asked Ross to find out why petitioner had scheduled the sentencing for a later date. Ross called petitioner and told him that he had thought petitioner was going "to try to dispose of that property before going on [his] vacation." Petitioner replied, "No, I don't think I could . . . work it out," adding that he needed to talk to Ross. Ross said that he hoped there were "no problems with the property," and petitioner responded, "No, I don't think so," but then added, "I don't know." Pet. App. 8.

On August 6, Ross called petitioner to tell him that he had an "upper estimate on the balance" in connection with the "act of sale" he had been "trying to get passed" for petitioner. Ross told petitioner that "if my figures are right," the balance was "around ten." Petitioner responded, "Yeah." The two men agreed to meet for lunch the next day to "go over the figures again." Ross told petitioner that he would bring "that information" with him so that petitioner could look at it. Ross met with Young the next morning and told him that he needed to

deliver the remaining funds at lunch that day. When Young reminded Ross that the arrangement had been that the balance would be paid after the sentencing, Ross explained that he "guess[ed] [petitioner] wanted to make sure that he got his money" and asked Young whether he could get "at least 10" immediately. Young returned an hour later with $11,000 in prerecorded bills in a brown folder. Ross then called petitioner and told him that "I just had to wait to get something." The two men met at a local restaurant a short time later. Ross arrived carrying the brown folder; petitioner left with it. Pet. App. 9-10.

Ross called Young later that day and told him that the presentence report had recommended an eight-year sentence and that the recommendation was "cramping [petitioner's] style."[3] Young's presentence report, which was prepared in early August, recommended that he be sentenced to eight years' imprisonment. Ross stated that petitioner could not impose a lighter sentence than the 40-month sentence Young received on a prior conviction without a letter from the United States Attorney's office. That same day, petitioner called the prosecutor who was handling Young's case and asked where Young's "letter of cooperation" was. The prosecutor stated that the government would not submit such a letter because Young had not cooperated. Petitioner pressed the prosecutor on the matter, and the prosecutor repeated that no letter would be forthcoming. Pet. App. 11.

---

[3] The presentence report relied in part on Young's prior criminal history, which included a 40-month sentence for a prior conviction. Because the offenses for which petitioner sentenced Young occurred before the effective date of the Sentencing Guidelines, Young was sentenced under the indeterminate sentencing system that prevailed before the Sentencing Guidelines.

On August 8, petitioner sentenced Young to 42 months' imprisonment. Ross called Young later that day to tell him that petitioner had stated that he could not justify giving Young a lower sentence than the sentence he had received for his prior conviction and that if he had "done anything else," he "would've been investigated." The next day, Ross met with Young and told him that petitioner had said, "I did the very best I could without getting myself and you and everybody else in trouble." According to Ross, petitioner had stated that he added two months to Young's previous sentence "to make it seem like I'm doing a legitimate thing." Young told Ross that his lawyer had mentioned filing a motion under Fed. R. Crim. P. 35 to reduce his sentence. Ross responded that he would check with petitioner, adding that "I believe I can get him to say yeah, I'll do a [Rule 35], just give me the justification." Ross then reminded Young that he still owed $31,500 of the $100,000 he had agreed to pay. Young gave Ross $31,500 in prerecorded bills on the next day (August 10). Ross promptly called petitioner and went to his chambers, where petitioner gave Ross specific instructions as to how Young should seek a reduction of his sentence. Pet. App. 11-13.

That afternoon, FBI agents executed search warrants for petitioner's person, his car, and his office in his chambers. The agents stopped petitioner as he was driving away from the courthouse and (at petitioner's request) returned with petitioner to his chambers to conduct the search. On the way to the courthouse, petitioner asked the agents for an explanation of the search. When they answered that there were allegations that petitioner had taken money from Ross in connection with Young's sentencing, petitioner stated that he had accepted no money from Ross for any reason and that he had not been involved in any business dealings with Ross. After they arrived at petitioner's chambers, the

agents served petitioner with a subpoena directing him to produce documents concerning any financial dealings with Ross. Petitioner stated that he had no records of financial dealings with Ross because he had not been involved in any such dealings. When the agents searched petitioner's chambers, they found $16,000 in cash: $6,000 from the payment Young had made to Ross on May 23, and $10,000 from the payment Young had made on August 7. Pet. App. 15.[4]

2. a. Before petitioner's trial, the government commissioned a telephone survey of 457 persons in the Eastern District of Louisiana, asking them questions relating to the criminal justice system and the upcoming trial. Before the government compiled and analyzed the data, defense counsel learned of the survey and reported it to the district court, which ordered the government not to engage in any further polling and to submit to the court the survey and all information generated to that point by the poll. Pet. App. 25-29, 224-229. After reviewing the survey and the results, the court found "nothing that could possibly harm the integrity of the jury that will be selected." *Id.* at 73. The court refused to turn over the polling material to the defendants before trial; it later explained its view that turning over the materials at that time "would raise issues that would unnecessarily complicate the proceedings." *Id.* at 85. The court explained that it was "concerned that if any details of the survey were publicized * * *, jury selection would be difficult because misunderstandings based on the results of the poll could taint the entire panel." *Id.* at 93. During voir dire at petitioner's trial, the court asked whether

---

[4] The agents also found $180 of the May 23 payment in petitioner's wallet; the agents recovered the bulk (more than $60,000) of the payments from Ross's office and a safety deposit box under Ross's control. See Gov't C.A. Br. 21-22.

any of the prospective jurors had been polled about the case; no member of the venire had been contacted by the pollsters. *Id.* at 27 & n.20, 86-87 n.1.

b. After voir dire, the district court informed the prosecutor and defense counsel that each side should exercise its peremptory challenges all at once and not in view of the other side. Petitioner's counsel objected to this procedure, stating that "when each side is required to exercise their challenges al[l] together without the other side seeing them and without the challenges being able to be evaluated vis-a-vis what the other ones are doing, we think [it] destroys part of our ability to make any meaningful *Batson* challenges." The court overruled the objection, and each side exercised its peremptory challenges. After the jury was selected, the court asked each attorney whether the jury was acceptable. Petitioner's counsel answered that it was, "[s]ubject to the matters we discussed with the Court that we can put in the record later." The district court then dismissed the venire. Pet. App. 32-33, 96-97.

After the venire was dismissed, petitioner's counsel moved for a mistrial, claiming that the government's use of six of its eight peremptory challenges to strike black jurors violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The district court held that petitioner had failed to establish a prima facie case of discrimination under *Batson* and denied the motion.[5] The court did, however, grant the government permission to supplement the record at a later time with an explanation of its peremptory strikes. Two days later, the court held a hearing at which the government set forth the reasons for its peremptory challenges. After hearing the government's explana-

---

[5] The jury seated for petitioner's trial was approximately 25% black, which roughly equaled the percentage of blacks in the district. Pet. App. 33 n.28.

tions and petitioner's response, the district court found that the government's justifications were race-neutral and not pretextual. Pet. App. 35-37, 93-94, 97-98.

c. Petitioner and Ross were tried together. At trial, Ross testified that he had received money from Young to start a business and that he had given petitioner the cash found in petitioner's chambers and in his wallet as a down payment on a piece of property that was to be used by the business. Petitioner did not testify. Pet. App. 17-18. To rebut the claim that Ross made the payments to petitioner in connection with a legitimate real estate transaction, the government introduced testimony that petitioner had told the FBI agents on August 10, 1990, that he had received no money from Ross and had been involved in no financial dealings with him. *Id.* at 47-49, 102. In his closing argument, the prosecutor stated:

> There was already $16,000 in his chambers. He had already started spending it. And he won't tell anybody what it's for. If it's a real estate deal, tell us. He is a federal judge for 13 years. He signed search warrants himself for years. He's presided over these trials for years. Are you going to tell me that he isn't capable *at that moment*, if there is a reasonable, innocent, legitimate explanation, from saying ["]Let me tell you what it's all about?["] He knows how the system works. He knows that you can explain. But, no, [petitioner's attorney] wants to create out of whole cloth in his own mind what happened.

Id. at 51. Petitioner moved for a mistrial, claiming that the prosecutor's statement was an improper comment on petitioner's failure to testify. *Id.* at 236-237. The district court denied the motion. *Id.* at 237. The court stated that it viewed the prosecutor's comments as a "reference to [petitioner's] lying * * * when he was

stopped on [August] 10th," and that it "d[id]n't see any basis for any mistrial on the comments." *Ibid.*

d. Sentencing Guidelines § 2C1.1(c)(2) provides that the sentence for a bribery offense committed "for the purpose of * * * obstructing justice" in respect to "another criminal offense" should be determined by "apply[ing] [Sentencing Guidelines] § 2X3.1 (Accessory After the Fact) * * * in respect to that other [criminal] offense if the resulting offense level is greater than that determined [by using §§ 2C1.1(a) and (b)]." Section 2X3.1, in turn, sets a base offense level "6 levels lower than the offense level for the underlying offense." The district court determined that the underlying offense in this case—Young's conviction for importing more than 2,500 pounds of marijuana—would carry a base offense level of 32 under the Guidelines. Because that offense level was greater than the level produced by using Guidelines §§ 2C1.1(a) and (b),[6] the district court set petitioner's base offense level at 26.[7] The court rejected petitioner's claim that the cross-reference provision of Section 2C1.1(c)(2) did not apply because Young's offense occurred before the effective date of the Guidelines, finding that "there is clearly nothing to indicate that the

---

[6] Sentencing Guidelines § 2C1.1(a) establishes a base offense level of 10 for bribery offenses, and Section 2C1.1(b)(2)(B) authorizes an eight-level increase for offenses involving payments for the purpose of "influencing * * * any official holding a high level decision-making or sensitive position." Accordingly, petitioner's offense level under those provisions would have been 18. See Pet. App. 64-65.

[7] The court increased petitioner's offense level by two levels pursuant to Sentencing Guidelines § 3B1.3, which authorizes a two-level enhancement if "the defendant abused a position of public . . . trust . . . in a manner that significantly facilitated the commission or concealment of the offense." See Pet. App. 65 n.60.

cross-reference portion of the Sentencing Guidelines is limited to any post-1987 act." Pet. App. 127-128.

3. After his conviction, petitioner moved for a new trial. He claimed, among other things, that the government's pretrial polling denied him a fair trial, that the district court erred in denying his *Batson* claim, and that the prosecutor's comments to the jury were inappropriate. The district court denied the motion. Pet. App. 82-103.

a. On the polling claim, the court concluded that "[a]ny possibility that the jury would be tainted was eliminated by questions posed by the Court during voir dire." Pet. App. 86. The court credited the government's testimony that the responses to survey questions requesting background and demographic information on the persons polled were never compiled or provided to the government, and characterized the information produced in response to those questions before the government ceased the survey process as "an unintelligible series of numbers and symbols." *Id.* at 88 n.2. Concluding that the information the government had "was useless without the missing background and demographic data," *id.* at 88, the court rejected petitioner's argument that the government gained an advantage by using the survey to develop a "juror profile" for use in jury selection and at trial. The court summarized its conclusions by explaining that there was "no evidence that the Government manufactured or 'tailored' evidence" based on those results. *Ibid.* Finally, the district court rejected petitioner's contention that he was entitled to pretrial disclosure of the survey results under *Brady* v. *Maryland*, 373 U.S. 83 (1963), based on its view that petitioner had not suffered any significant prejudice as a result of the court's decision not to disclose the results before trial. Pet. App. 88-93.

b. With respect to petitioner's *Batson* claim, the court noted that petitioner had been "given ample opportunity to develop a * * * record of discrimination" before the venire was dismissed, but had "elected to wait." Pet. App. 96-97. Accordingly, the court reaffirmed its denial of petitioner's *Batson* claim. *Id.* at 99.

c. Finally, the court rejected petitioner's claim that the prosecutor's closing argument included an improper comment on petitioner's failure to testify at trial. Pet. App. 101-102. The district court concluded that the challenged portion of the argument did not refer to petitioner's decision not to testify, but to his failure on August 10 to provide the innocent explanation he offered at trial. The court stated: "Taken in context, * * * the remarks in question refer to [petitioner's] failure to provide the innocent explanation that he presented at trial (a real estate transaction) for the $16,000 cash found in his office, on August 10, 1990, when it would have been natural to do so." *Id.* at 102.

4. The court of appeals affirmed. Pet. App. 1-70.

a. The court rejected petitioner's contention that the government deprived him of due process by conducting the pretrial survey. Pet. App. 25-31. The court of appeals agreed with the district court that the poll was a "red herring" that did not deprive petitioner of a fair trial. *Id.* at 27. In particular, the court found that the government was not able to make use of the survey results during jury selection, and that the district court's voir dire was adequate to ferret out any bias among the prospective jurors. *Id.* at 28-30. The court also concluded that although petitioner "might have found the [poll] results beneficial in trial preparation," *id.* at 31, the district court's refusal to disclose the results did not "significantly handicap[]" petitioner in preparing for

trial or conducting his defense, *ibid.* Accordingly, the court of appeals found no due process violation.[8]

b. Petitioner also renewed his challenge to the procedures followed by the district court with respect to his *Batson* claim, arguing that the trial court acted improperly in dismissing the venire before petitioner had an opportunity to create a record to support his claim. The court of appeals rejected that claim. Pet. App. 32-38. The court of appeals explained that petitioner's failure to object or to ask the court to retain the venire before it was dismissed "waived [his] right to create a record while the venire was present." *Id.* at 35. Moreover, even if the district court had dismissed the venire prematurely, the court of appeals found it "difficult to see how additional questioning would have aided" petitioner in establishing a *Batson* violation.[9] *Id.* at 35 n.30.

The court of appeals also rejected petitioner's claim that the district court erred in permitting the government to state its justifications for its peremptory challenges two days after the jury was impaneled. The court noted that petitioner had not objected when the district court agreed to permit the government to place its justifications for the peremptory challenges on the record, "presumably at some future date." For that reason, the court concluded, petitioner "cannot now complain when [he] failed to object contemporaneously." Pet. App. 36.

---

[8] The court of appeals also rejected petitioner's related claim that he was entitled to disclosure of the poll results under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The court reasoned that the results were "not evidence," and that the government therefore had no obligation to disclose them. Pet. App. 31 n.27.

[9] The court observed that "[i]n determining whether the government discriminated against black potential jurors, the focus is on the responses the stricken jurors actually gave during voir dire, not on responses they might have given had they been asked additional questions." Pet. App. 35 n.30.

Petitioner also attacked the district court's finding that the government's explanations for its peremptory challenges were race-neutral and not pretextual. The court of appeals rejected that claim as well, finding "no error" in the district court's determination that the government's justifications were adequate under *Batson*. Pet. App. 37-38.

c. The court of appeals also rejected petitioner's claim that the prosecutor's statement during closing argument that petitioner "won't tell anybody what it's for"—referring to the $16,000 found in petitioner's chambers—was an improper comment on petitioner's failure to testify or on his prearrest silence. Pet. App. 46-55. The court of appeals agreed with the district court that "the prosecutor's comment was not improper when taken in context." *Id.* at 47. Reviewing both parties' closing arguments in detail (*id.* at 48-51), the court observed that the prosecutor repeatedly had referred to the inconsistency between petitioner's defense at trial—that the funds were a payment from Ross in connection with a real estate transaction—and his statements to the FBI agents on August 10, 1990—in which he denied that he had been involved in any financial dealings with Ross or received any payments from him. *Id.* at 47-49.

The court also noted that the challenged statements were made by the prosecutor in an attempt to rebut the argument of petitioner's attorney. Petitioner's attorney had argued that petitioner's statements to the FBI agents were understandable as the reaction of an experienced judge who knew that the agents were "not there for explanation," but were attempting to "solidify [the] case." Pet. App. 50-51. The court of appeals noted that the prosecutor referred to the explanation petitioner gave "at that moment," *i.e.*, at the time he spoke to the agent. The court of appeals therefore concluded that the prosecutor "was referring to [petitioner's] denial 'at that

moment' (August 10) that he had had any business dealings with Ross." *Id.* at 51. The prosecutor's argument thus did not constitute an impermissible comment on petitioner's failure to take the stand. *Id.* at 52. In the alternative, the court of appeals concluded that any impropriety in the prosecutor's remarks was harmless; the court explained that "[e]ven if the prosecutor did comment on [petitioner's] failure to testify, it is plain beyond a reasonable doubt that, given the weight of the evidence, the jury would have returned a guilty verdict absent the remark." *Id.* at 52 n.47.

Petitioner also argued that if the prosecutor's statements were understood as a reference to the events surrounding petitioner's arrest, the remarks were an impermissible comment on petitioner's prearrest silence. In rejecting that argument (Pet. App. 52-55), the court of appeals noted that there was disagreement in the courts of appeals on the propriety of a prosecutor's commenting on a non-testifying defendant's prearrest silence. *Id.* at 52-53. The court concluded, however, that it "need not reach this question," because it found that "the prosecutor's comments were directed primarily toward [petitioner's] affirmative statements—his denial of any business dealings with Ross—as distinguished from his silence." *Id.* at 53. Because "the prosecutor commented on [petitioner's] pre-arrest statements, not his silence," the court rejected petitioner's claim that the prosecutor's statements were improper. *Id.* at 54-55. Also, as with the related claim, the court concluded that "even if the prosecutor's comments were improper, any error would be harmless." *Id.* at 55 n.52.

d. Finally, the court rejected petitioner's claim that the district court erred in sentencing him under Guidelines § 2C1.1(c)(1), because the underlying offense on which the sentence was based—Young's conviction for importing marijuana—was a pre-Guidelines offense. Pet.

App. 66-67. The court of appeals observed that petitioner had "offered no other way in which a court could take into account the seriousness of the underlying offense." *Id.* at 67. The court also found "no inequity" in the fact that petitioner received a more severe sentence than Young, explaining that "Young committed a pre-[G]uidelines offense; [petitioner] did not." *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 10-16) that the pretrial polling by the government and the failure to disclose the poll results before trial deprived him of due process. He argues first (Pet. 12) that government polling of prospective jurors "in and of itself is a denial of due process." This Court has made clear, however, that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982); see *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) (aim of due process "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused"). Thus, "[e]ven in cases of egregious prosecutorial misconduct," the Court has approved reversal of a conviction only when the misconduct was "material to the case." *Phillips*, 455 U.S. at 220 n.10.

Petitioner was not prejudiced by the government's pretrial polling. Although he asserts (Pet. 11) that knowledge of the poll results gave the government "a head start in knowing the attitudes of persons who would sit as jurors in this matter," the district court found that no member of the jury venire was contacted by the pollsters. Pet. App. 86-87. Moreover, because the responses to survey questions requesting demographic information about the persons polled were never compiled or provided to the government, the prosecutor was

unable to use the survey results to select jurors who held certain attitudes. See *id.* at 87-88. Nor is there any support for petitioner's claim (Pet. 14) that the poll enabled the government to "form and fashion its evidence to fit the mind-sets of jurors."[10] To the contrary, the district court found "no evidence that the [g]overnment manufactured or 'tailored' evidence" based on the poll results. See Pet. App. 88. In sum, even if the pretrial polling was objectionable, the members of the jury were not affected by the polling and the government made no use of the poll results before or during petitioner's trial. Hence, due process does not require that petitioner's conviction be reversed on that ground.

Petitioner also contends (Pet. 11-12, 15-16) that the "principles" of *Brady* v. *Maryland* required the government to disclose the poll results to petitioner before trial. In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court later explained that "implicit in [*Brady's*] requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *United States* v. *Agurs*, 427 U.S. 97, 104 (1976). Thus, "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt," *id.* at 112, and a due process violation will have occurred only when the omitted evidence, evaluated in light

---

[10] The only example petitioner cites (Pet. 14) of the government's alleged use of the poll results in devising its trial strategy is "the prosecutor's improper comment during closing argument on [petitioner's] failure to testify." Both the district court and the court of appeals, however, specifically found that the prosecutor did not comment on petitioner's failure to testify. See Pet. App. 52, 102.

of the entire record, "creates a reasonable doubt that did not otherwise exist." *Ibid.*; see *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (nondisclosure of impeachment evidence requires reversal of a conviction "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

Petitioner claims (Pet. 13-16) that he was disadvantaged by his ignorance of the poll's finding that a substantial percentage of those polled believed that a criminal defendant should be required to prove his innocence. See Pet. App. 25, 27-28 n.21. He asserts (Pet. 13) that he would have altered his trial strategy if he had known that the jurors "believed that a defendant had to prove himself innocent." But even if the poll results could be viewed as indicative of the pretrial beliefs of the persons who actually served on petitioner's jury, the district court instructed the prospective jurors that the government had the burden of proof to establish guilt beyond a reasonable doubt.[11] See Pet. App. 28-29. Thus, the district court's instructions were adequate to dispel any confusion the jurors might have had before trial concerning the burden of proof. See *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987) (noting "the almost invariable assumption of the law that jurors follow their instructions"). Because the poll results could not have "affected the outcome of the trial," *Agurs*, 427 U.S. at 104, the *Brady* rule did not obligate the court to disclose those results to petitioner before trial.

2. Petitioner also contends (Pet. 16-23) that the government's use of its peremptory challenges to strike

---

[11] The district court also inquired during voir dire about the jurors' ability to render a verdict based solely on the evidence presented at trial and the law as stated by the court. See Pet. App. 28-29 & n.22.

black prospective jurors violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Petitioner first asserts (Pet. 17-19) that the district court did not permit him to object to the government's exercise of its peremptory strikes until "after the venire was dismissed and the jury was sworn," and so prevented him from developing a record to support his claim of discrimination.[12] The record does not support that assertion. After the jury was selected but before the venire was dismissed, the district court asked each attorney whether the jury was acceptable. See Pet. App. 33, 96-97. If petitioner had wanted to raise his *Batson* claim before the venire was dismissed, he could have done so at that time. Thus, petitioner is incorrect in claiming that he had no opportunity to object to the government's use of its peremptory challenges before the venire was dismissed.

Petitioner also contends (Pet. 19) that the district court erred in allowing the government to state its justifications for the peremptory challenges two days after the jury was selected. He suggests no reason, however, to conclude that the brief delay affected the district court's ability to evaluate the credibility of the prosecutor's explanations. See *United States* v. *Romero-Reyna*, 889 F.2d 559, 562 n.6 (5th Cir. 1989) (possibility that a subsequent hearing might allow prosecutor to fabricate reasons for strikes that did not exist at the time of jury selection is merely "fit grist for the trial judge's mill as he assesses the prosecutor's credibility"), cert. denied, 494 U.S. 1084 (1990); see also *United States* v. *Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (allowing government to offer explanations for peremptory strikes on remand after appeal), cert. denied, 488 U.S. 983 (1988); *United*

---

[12] As the court of appeals pointed out (Pet. App. 35 n.30), it is not clear how further examination of the venire would have advanced petitioner's *Batson* claim.

States v. *David*, 803 F.2d 1567, 1571 (11th Cir. 1986) (same).

There also is no basis for disturbing the district court's refusal to find a *Batson* violation after hearing the prosecutor's explanations. In *Hernandez* v. *New York*, 111 S. Ct. 1859 (1991), this Court confirmed that the trial court's acceptance of the prosecutor's reasons is subject to deferential review and may not be set aside unless it is clearly erroneous. 111 S. Ct. at 1868 (plurality opinion of Kennedy, J.) ("the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal"); *id.* at 1873 (O'Connor, J., concurring) (agreeing that Court should "review for clear error the trial court's finding as to discriminatory intent"). The determination that the prosecutor's reasons are not discriminatory rests on a finding of credibility, an issue as to which "[t]here will seldom be much evidence," and "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Id.* at 1869 (plurality opinion of Kennedy, J.). Accordingly, appellate courts rarely are in a position to second-guess the trial court's conclusion that the prosecutor's motive in challenging members of the venire was not invidious.

In this case, the prosecutor's explanations for the peremptory strikes were clear, specific, and race-neutral, as *Batson* requires, see 476 U.S. at 98 & n.20, and the district court did not clearly err in accepting them. *Batson* requires only that a strike not be based on race; "the reason offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause." *Hernandez*, 111 S. Ct. at 1868 (plurality opinion of Kennedy, J.). That standard was satisfied here. First, the court of appeals correctly rejected petitioner's claim that the government engaged in purposeful discrimination when it struck a black juror who was a teacher's

aide who provided speech therapy to disabled children, but did not strike a white juror who was a teacher at a technical school. As the court of appeals observed, the government's explanation that a juror who helped disabled children might be more sympathetic to criminal defendants than someone who worked in a technical school was "reasonable." Pet. App. 37 n.32; see *United States* v. *Briscoe*, 896 F.2d 1476, 1487-1488 (7th Cir. 1990) (upholding strike of prospective juror who was a youth supervisor at a juvenile penal center); *United States* v. *Wilson*, 867 F.2d 486, 487-488 (8th Cir.) (social worker with juveniles), cert. denied, 493 U.S. 827 (1989).[13] Similarly, the court properly rejected petitioner's claim that the government's explanation that it struck a black prospective juror because he was employed by a company that was being investigated by federal authorities was pretextual. Contrary to petitioner's suggestion (Pet. 21-22), federal prosecutors were involved in an ongoing investigation of the company at the time of the trial in this case.[14]

3. Petitioner also contends (Pet. 23-27) that the prosecutor commented during closing argument on his failure to testify, or, in the alternative, that the prosecutor commented on his prearrest silence. The court of appeals correctly rejected that contention.

In *Griffin* v. *California*, 380 U.S. 609 (1965), the Court held that a prosecutor's comments on a defendant's failure to testify at trial violated the defendant's Fifth

---

[13] Petitioner also claims (Pet. 20) that the government's explanation that it struck a black prospective juror because he was sleeping was pretextual because "the trial court even noted that it never saw the stricken juror sleeping." The trial court accepted the prosecutor's explanation, however, and there is no reason for this Court to second-guess that credibility determination.

[14] The government also struck a white prospective juror who was an employee of the same company. See Gov't C.A. Br. 51 n.33.

Amendment privilege against compelled self-incrimination. Whether a prosecutor's remarks are proscribed by *Griffin* depends on the context in which the remarks are made. *United States* v. *Robinson*, 485 U.S. 25, 33 (1988). The court of appeals found that a central theme of the prosecutor's closing argument was the inconsistency between petitioner's pretrial statements to federal agents and the defense petitioner presented at trial. After petitioner's counsel sought to explain the inconsistency by arguing that petitioner knew that the agents were "not there for explanation," the prosecutor responded by pointing out that petitioner could have offered a legitimate explanation "at that moment." See Pet. App. 50-51. In context, it is clear that the prosecutor's remarks were directed at the plausibility of petitioner's defense, not at his failure to testify.[15]

Petitioner also renews his claim (Pet. 26-27) that the prosecutor's statements constituted an improper comment on his prearrest silence. He asserts (Pet. 27) that there is a conflict in the circuits on the question of the constitutionality of a prosecutor's comment on the prearrest silence of a non-testifying defendant. This case, however, does not present that issue. The court of appeals expressly declined to reach that question, as it found that the prosecutor's comments referred to petitioner's prearrest statements, not to his silence. Peti-

---

[15] Petitioner asserts (Pet. 23-24) that the prosecutor's use of the present tense in his closing argument, as well as his "pointing directly" at petitioner and "raising his voice," indicated that his remarks were intended to refer to petitioner's failure to testify. But, as the court of appeals observed, the prosecutor "used the present tense throughout his closing argument," Pet. App. 50 n.45, and his pointing and raised voice "reasonably would have been viewed by the jury as the prosecutor's attempt to add emphasis to his argument relating to [petitioner's] August 10 denials." Pet. App. 52 n.46.

tioner suggests no persuasive reason for this Court to disturb that determination.[16] Accordingly, there is no reason for the Court to consider in this case whether a prosecutor may comment on the prearrest silence of a non-testifying defendant.[17]

4. Finally, petitioner contends (Pet. 28-30) that the district court deprived him of due process by basing his sentence in part on the seriousness of Young's pre-Guidelines offense. That claim is without merit. Sentencing Guidelines § 2C1.1(c)(2) applies to all bribery offenses committed "for the purpose of * * * obstructing justice" in respect to "another criminal offense." Section 2C1.1(c)(2) directs the court to determine the sentence for such offenses by applying Guidelines § 2X3.1, which in turn sets the offense level on the basis of the "offense level for the underlying offense." Neither provision indicates that the sentence may be based only on an "underlying offense" that is subject to sentencing under the Guidelines. Cf. *United States* v. *Willis*, 925 F.2d 359, 361-362 (10th Cir. 1991) (in determining defendant's sentence for illegal possession of firearm, provision of Guidelines that directed court to calculate sentence on the basis of "other offense" committed with firearm applied to state as well as federal offenses);

---

[16] Petitioner asserts (Pet. 25-26) that the prosecutor's remarks referred to petitioner's silence during the search of his chambers when, he claims, he "refused to say anything." In fact, petitioner denied having any financial dealings with Ross while the FBI agents were transporting him to the courthouse on August 10, and he repeated those denials after they arrived at his chambers. See Pet. App. 14-15.

[17] In any event, as the court of appeals found (Pet. App. 52 n.47, 55 n.52), any impropriety in the prosecutor's remarks was harmless in light of the overwhelming evidence against petitioner. Compare *Darden* v. *Wainwright*, 477 U.S. 168, 181-183 (1986).

United States v. *Smith*, 910 F.2d 326, 329-330 (6th Cir. 1990) (same).

It does not violate due process to judge the seriousness of petitioner's bribery offense by considering the seriousness of the crime for which petitioner was prepared to reduce the sentence. Petitioner offers no substantial basis for concluding that this admittedly "unique issue of sentencing" (Pet. 28) warrants further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

NINA GOODMAN
Attorney

FEBRUARY 1993